APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17539
D.C. No. CV-97-548 LKK

UNITED STATES OF AMERICA *ex rel.*
FOUNDATION AIDING THE ELDERLY; MARSHA J. BAKER,
Plaintiffs-Appellants,

v.

HORIZON WEST INC., a California Corporation; HERITAGE CONVALESCENT HOSPITAL; EMPRESS CONVALESCENT HOSPITAL; EMERALD DISTRIBUTING COMPANY, INC.; FAR WEST INC., a California Corporation; LINWOOD GARDENS CONVALESCENT HOSPITAL, INC., a California Corporation; MID-VALE CONVALESCENT HOSPITAL, INC.; SACRAMENTO CONVALESCENT HOSPITAL, INC., a California Corporation; SOUTH GATE CARE CENTER INC., a California Corporation; VALLEJO CONVALESCENT HOSPITAL, INC.; WESTGATE GARDENS CONVALESCENT CENTER, INC.; MONTEREY BAY CONVALESCENT HOSPITAL, INC.; SIERRA MEDICAL ENTERPRISES INC. SIERRA MEDICAL ENTERPRISE, INC. dba Grass Valley Convalescent Hospital; EL DORADO CONVALESCENT HOSPITAL INC.; FOOTHILL OAKS CARE CENTER INC.; HILLTOP MANOR CONVALESCENT HOSPITAL INC., LAKEPORT SKILLED NURSING CENTER INC.; LINCOLN MANOR INC.; LIVE OAK MANOR INC.; MEADOW VIEW MANOR INC.; MONTEREY PINES SKILLED NURSING FACILITY INC.; NAPA NURSING CENTER INC.; PLACERVILLE PIES [*sic*] CONVALESCENT HOSPITAL INC.; ROSEVILLE CONVALESCENT HOSPITAL INC.; SIERRA HILLS CARE CENTER INC.; SUNNY HILLS CONVALESCENT HOSPITAL INC.; VALLEY VIEW

SKILLED NURSING FACILITY INC.; WALNUT WHITNEY CONVALESCENT HOSPITAL INC.; SIERRA SOLANO CARE CENTER INC.; WESTCARE MANAGEMENT INC.; FOUR CORNERS REGIONAL CARE CENTER INC.; PARKDALE CARE CENTER INC.; RED CLIFFS REGIONAL INC.; HORIZON WEST INC.; PACIFIC WEST PHARMACY INC., a California Corporation; ELLEN L. KUYKENDALL; BERNICE SCHRABECK; MICHAEL MCDONALD; MILTON HARMON; AUBURN MANOR INC., dba Golden Empire Convalescent Hospital dba Parkview Nursing Center; MEDICREST OF CALIFORNIA INC., dba Medical Center Convalescent Hospital; MEDICREST OF CALIFORNIA 1 INC., dba Arlington Gardens Convalescent Hospital dba Montclair Manor Convalescent Hospital; WHITEHALL CONVALESCENT HOSPITAL INC., dba Wellesley Manor Convalescent Hospital; SIERRA HEALTH CARE MANAGEMENT CORPORATION dba Sierra Health Care Convalescent Hospital; SANDY REGIONAL INC., Sandy Regional Convalescent and Rehabilitaion [*sic*] Center,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
April 11, 2001—San Francisco, California
Filed, September 13, 2001
[Stamped "Entered Sep 18 2001 Calendared"]
[As Amended by December 21, 2001 Order, see *infra* Appendix D]

Before: STEPHEN REINHARDT, A. WALLACE TASHIMA, AND MARSHA S. BERZON, *Circuit Judges*.

Opinion by Judge Tashima.

TASHIMA, Circuit Judge:

I.

Appellants filed this qui tam action alleging that Appellees defrauded the United States by receiving payments from Medicare and Medicaid for care which was not given. The district court dismissed the action because it held that 31 U.S.C. § 3730(e)(4)(A)'s public disclosure bar deprived it of jurisdiction. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.[1] We review the district court's findings of fact relevant to its determination of subject matter jurisdiction for clear error. *See United States ex rel. Biddle v. Bd. of Trs. of Leland Stanford, Jr. Univ.*, 161 F.3d 516, 520 (9th Cir. 1999). Whether a particular disclosure triggers the jurisdictional bar of § 3730(e)(4)(A), however, is a mixed question of law and fact that we review de novo. *See United States ex rel. Lindenthal v. Gen. Dynamics Corp.*, 61 F.3d 1402, 1409 n.9 (9th Cir. 1995).

II.

The False Claims Act ("FCA") deprives a district court of jurisdiction over any *qui tam* action that is based on allegations or transactions already disclosed in certain public fora, unless the relator is the original source of the

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[1] Appellees contend that we lack jurisdiction over this appeal because Appellants failed to amend their notice of appeal after the district court issued its final written order. Fed. R. App. P. 4(a)(2) provides, however, that if a "notice of appeal [is] filed after the court announces a decision or order—but before the entry of the judgment or order—[it] is treated as filed on the date of the entry." Thus, Appellants' notice of appeal, which was filed after the district court orally announced its decision on November 11, 1999, but before it issued its written order, became effective on January 6, 2000—the date of the entry of the order, and we do not lack jurisdiction over this appeal.

information underlying the action. *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir. 2000).[2] In analyzing whether a claim is barred under the FCA, we must first determine whether there has been a prior "public disclosure" of the "allegations or transactions" underlying the *qui tam* suit. *See id.* (citing *United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018 (9th Cir. 1999)). "If and only if there has been such a public disclosure," we then inquire into whether the relator is an "original source" within the meaning of § 3730(e)(4)(B). *Id.*

The question of whether the "allegations or transactions" underlying the relators' fraud claims have been publicly disclosed, in turn, requires that we make two separate but related determinations. *See A-1 Ambulance Serv.*, 202 F.3d at 1243. First, we "must decide whether the public disclosure originated in one of the sources enumerated in the statute." *Id.* Public disclosure can occur in one of only three categories of public fora: (1) in a "criminal, civil, or administrative hearing;" (2) in a "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation;" or (3) in the "news media." *Id.* (quoting 31 U.S.C. § 3730(e)(4)(A)).

If there has been a public disclosure through one of these sources, we then determine whether the content of the disclosure consisted of the "allegations or transactions" giving rise to the relators' claim, as opposed to "mere

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[2] The relevant section of the FCA provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

information." *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996). The substance of the disclosure, however, need not contain an explicit "allegation" of fraud, so long as the material elements of the allegedly fraudulent "transaction" are disclosed in the public domain. *See id.* (citing *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D. C. Cir. 1994)).

A.

The first issue tendered for decision is whether the publicly-disclosed surveys at issue qualify as public disclosures as defined in the statute.[3] Appellants argue that the surveys do not qualify as public disclosures because they are not "audits," "reports," or "investigations" within the meaning of § 3730(e)(4)(A)'s second category of public fora.[4] Appellees contend that the surveys do so qualify and

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[3] Appellants challenge only whether the surveys qualify as public disclosures, not whether the other publicly-disclosed information offered by Appellees, such as the civil lawsuits filed in two separate courts, the newspaper article, and the various public hearings, so qualify under § 3730(e)(4)(A).

[4] In order to participate in either Medicare or Medicaid, skilled nursing facilities must permit the surveys at issue and the inspections on which they are based. 42 U.S.C. § 1395i-3(g)(2)(A)(i) (providing that to be eligible to receive Medicare and Medicaid, all skilled nursing facilities "shall be subject to a standard survey, to be conducted without any prior notice to the facility."). The purpose of these surveys is to "assess whether the quality of care, as intended by the law and regulations, and as needed by the resident, is actually being provided in nursing homes." 42 C.F.R. § 488.110. These surveys, *inter alia*, (1) report on the quality of care; (2) review the facilities' written plans of care and, through residents' assessments, determine the adequacy of such plans of care; and (3) review compliance with residents' rights. 42 U.S.C. § 1395i-3(g)(2)(A)(ii); 42 C.F.R. § 488.1-488.456. To insure consistent reporting, the interpreting regulations provide for the surveys' (1) form, *see* 42 C.F.R. § 488.115; (2) content, *see id.* § 488.110, and (3) frequency, *see id.* § 488.308.

further argue that the surveys also qualify as public disclosures falling within § 3730(e)(4)(A)'s first category of public fora—namely, as "criminal, civil, or administrative hearings."

We need not answer that question today, however. That is so because, even assuming that the surveys do qualify as public disclosures, this action is still not barred because none of the disclosures in the surveys or any of the other disclosures reveal either the allegations or transactions at issue in this case.

B.

Even assuming that a disclosure qualifies as a "public disclosure" under § 3730(e)(4)(A), in order for the jurisdictional bar to apply, that disclosure must reveal the "allegations or transactions" underlying Appellants' complaint. *See Hagood*, 81 F.3d at 1473. In analyzing whether *allegations* of fraud were previously disclosed, we must determine whether there was a public disclosure of fraud which was "substantially similar to those disclosed in the earlier . . . action." *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1033 (9th Cir. 1998). In analyzing whether the *transactions* underlying a relator's complaint were publicly disclosed, however, we adopt the analysis first laid out by the District of Columbia Circuit in *Spingfield [*sic*] Terminal*:

> [I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed.

14 F.3d at 654. In so doing, we also adopt the District of Columbia Circuit's reasoning that in a fraud case, X and Y inevitably stand for but two elements: "a misrepresented state of facts and a true state of facts." *Id.* at 655.

C.

Several documents purportedly publicly disclosed allegations of fraud against at least some Appellees, including the parent company of all of the other Appellees, Horizon West, Inc. For example, a complaint filed in the Yolo County Superior Court raises general allegations of fraud against some of the Appellees. In the body of the complaint, however, the plaintiffs only alleged that the defendants generally misrepresented to them the level of care provided by the particular nursing facility. While these allegations may disclose some fraud on the part of the defendants, they only remotely support the claims at issue. Indeed, at most, these allegations only disclose the true set of facts, *viz.*, that the facility in question provided substandard care. What is conspicuously missing from that complaint are any allegations that the named defendants misrepresented the level of care to the government and received payment for that alleged substandard care.

Also, a complaint filed in the Solano County Superior Court against Horizon West, Inc., Vallejo Convalescent Hospital Inc., and Ellen Kuykendall (among others) generally alleged that these defendants "fraudulently conceal[ed] from [residents, employees, physicians, governmental officials who inspect or have other business in the facility, family members, friends, suppliers of goods and services, volunteers and other persons who frequent the facility] the improper, deficient care of residents and the hazardous health conditions alleged herein." But, the complaint addressed a very different problem—asbestos contamination—than the one alleged here. Thus, the allegations contained therein completely failed to disclose anything remotely similar to the fraud alleged here.[5]

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[5] Appellees also present a Sacramento Bee article which reported that Foothill Oaks Care Center received a citation, and a fine, for a premature entry on a patient's chart. They argue that this article publicly disclosed a

Consequently, these unrelated allegations of fraud cannot trigger § 3730(e)(4)(A)'s jurisdictional bar. Although "fraud" may have been generally alleged against some of the current Appellees in certain contexts, none of the evidence in the record "fairly characterizes" the kind of fraud alleged by Appellants here. To put it somewhat differently, "it is [im]possible to say that the evidence and information in the possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1377 (D.C. Cir. 1981) (quoting *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978)). Therefore, we conclude that this action is not barred by the previous disclosure of the fraud at issue.

D.

Even if the above *allegations* did not specifically identify the fraud at issue, the action may still be barred if some disclosures revealed the *transactions* underlying the fraud.

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fraudulent transaction and thus bars the instant suit. Once again, however, we do not believe that this report would give the government sufficient information to initiate an investigation against this facility. *See Alcan Elec. and Eng'g, Inc.*, 197 F.3d at 1019. While the premature entry in the patient's medical chart may be a technical violation of the appropriate regulations, and thus subjected the facility to a penalty, it sheds little light on the current allegations—namely, that payments were sought for care not given. Indeed, nothing in the article indicates that the care which is the subject of the premature entry was not given, or that it was paid for. Thus, we decline to hold that the jurisdictional bar applies to that Appellee.

Appellees also point to general allegations of fraud that were directed at the nursing home industry in general. But, as pointed out by Appellants, none of these "disclosures" related to Horizon West or specifically to any of its facilities. Therefore, they do not trigger the jurisdictional bar. *See Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) ("The allegations of widespread . . . fraud made in sources in which BCBSF was not specifically named or otherwise directly identified are insufficient to trigger the jurisdictional bar").

On this record, however, we are unable to so conclude. The primary source which could potentially reveal the underlying fraudulent transactions are the surveys.[6] In order to do so, the surveys must disclose both "a misrepresented state of facts and a true state of facts." We do not dispute Appellees' assertion that at least the true state of fact has been disclosed by the surveys—namely, that the defendant provided sub-standard care. But we cannot conclude from the surveys alone that the misrepresented state of fact has also been disclosed. This is especially important because the FCA speaks of "transactions." Thus, in order to invoke the jurisdictional bar, a defendant must show "that the transaction . . . be one in which a set of misrepresented facts has been submitted to the government." *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 741 (3d Cir. 1997) (footnote omitted); *accord United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992) ("The requisite intent is the knowing presentation of what is known to be false" which is "something less than that set out in the common law."). They have not done so here.

III.

Accordingly, we conclude that the evidence disclosed failed to expose either the fraud alleged or the transactions underlying that fraud. Consequently, the district court's dismissal of the action as barred by a "public disclosure" is reversed and the case is remanded for further proceedings consistent with this opinion.[7]

REVERSED AND REMANDED.

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[6] The Second Amended Complaint specifically alleges instances of substandard care against 17 defendants. The great majority of these specific allegations are taken from the surveys; a few of the specific allegations are based on observations by private individuals. As to all the other defendants, Appellants only generally allege that they have committed acts "similar to other Horizon facilities."

[7] We also deny Appellees' motion to strike.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* FOUNDATION AIDING THE ELDERLY, a California Non-Profit corporation; and MARSHA J. BAKER,

Plaintiffs,

v.

HORIZON WEST INC., a California corporation; AUBURN MANOR, INC., a California corporation, *et al.*,

Defendants.

[Stamped "Filed Aug 20, 1999
Clerk, U.S. District Court
Eastern District of California
By Deputy Clerk" and
"Entered Aug 26 1999 Calendared"]

ORDER

I.

PROCEDURAL HISTORY

Relators Foundation Aiding the Elderly ("FATE"), a California non-profit corporation, and Marsha Baker filed this qui tam suit under the False Claims Act ("FCA or "the Act"), alleging that defendant Horizon West, Inc. and the corporate owners of thirty-nine other skilled nursing facilities engaged in a pattern and practice of falsifying medical records to conceal inadequate medical care. Relators allege that the staff at defendants' facilities delivered substandard care to many resident Medicare and Medicaid patients,[1] and deliberately

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[1] Federal law provides that skilled nursing facilities as a precondition for receiving federal funds such as Medicare and Medicaid, must comply

falsified documentation of the level of care in the activities of daily living ("ADLs") which are supposed to substantiate the billing for federal funds under Medicare and Medicaid.

Subject to the parties' stipulation, the court bifurcated the litigation in this case. The scheduling order provided that the court would adjudicate the propriety of subject matter jurisdiction first, and therefore directed that during the initial phase the parties were to conduct all discovery necessary to fully resolve the jurisdictional issue. Accordingly, defendants noticed the instant motion challenging this court's jurisdiction over the relators' claims.[2]

II.

STANDARDS FOR DISMISSAL UNDER FED. R. CIV. P. 12(b)(1)

It is well established that the party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936); *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the standards that must be applied vary according to the nature of the jurisdictional challenge.

If the challenge to jurisdiction is a facial attack, *i.e.*, the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to

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with federal, state and local operating laws and professional standards. *See* 42 U.S.C. § 1395i-3 (Medicare), 42 U.S.C. § 1396r (Medicaid), and 42 C.F.R. part 483. Standards of care are also codified in the Omnibus Budget Reconciliation Act (OBRA) of 1987, § 1861(j) of the Social Security Act. *See* 42 U.S.C. § 1395i-3 (Medicare), 42 U.S.C. § 1396r (Medicaid), and 42 C.F.R. part 483.

[2] In actuality, defendants noticed forty separate motions for dismissal—one brought by each individual defendant—in addition to a joint motion addressing all similar legal and factual issues. The relators oppose all forty-one motions with one joint motion.

demonstrate the existence of jurisdiction, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. The factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. *See* 2A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* para. 12.07[2.-1], at 12-46 to 12-47 (2d ed. 1987). *See also Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 731 (11th Cir. 1982); *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981), *cert. den.*, 454 U.S. 897 (1981); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A complaint will be dismissed for lack of subject matter jurisdiction (1) if the case does not "arise under" any federal law or the United States Constitution, (2) if there is no case or controversy within the meaning of that constitutional term, or (3) if the cause is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962).

If the challenge to jurisdiction is made as a "speaking motion" attacking the truth of the jurisdictional facts alleged by the plaintiff, a different set of standards must be applied. *Thornhill Pub. Co., Inc. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Where the jurisdictional issue is separable from the merits of the case, the district court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Thornhill*, 594 F.2d at 733. "In such circumstances '[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims.'" *Augustine*, 704 F.2d at 1077 (quoting *Thornhill*, 594 F.2d at 733).

> However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to

> the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial.

Augustine, 704 F.2d at 1077 (citing *Thornhill*, 594 F.2d at 733-35; 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1350, at 558 (1969 & Supp. 1987)). On a motion going to the merits, the court must, of course, employ the standard applicable to a motion for summary judgment. *Farr v. United States*, 990 F.2d 451, 454 n.1 (9th Cir. 1993), *cert. denied*, 510 U.S. 1023 (1993).

III.

PROCEDURAL RULINGS

Defendants move pursuant to Fed. R. Civ. P. 12(b)(1), contending that the relators cannot surmount the public disclosure limitation in the False Claims Act. *See* 31 U.S.C. § 3730(e)(4)(A)-(B). Before addressing the substantive inquiry, I turn first to three procedural issues raised in the relators' opposition.

A. FACIAL ATTACK v. SPEAKING MOTION

First, relators oppose this motion largely assuming that the jurisdictional allegations in the complaint suffice to rebut defendants' jurisdictional evidence to the contrary. However, defendants do more than argue that the complaint lacks allegations to support jurisdiction. Defendants challenge the relators' ability to adduce facts supporting jurisdiction at the time the complaint was filed. *See Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). On such a speaking motion attacking jurisdictional facts, "[n]o presumptive truthfulness attaches to plaintiff's allegations . . . ." *See Augustine*, 704 F.2d at 1077; *see also* 3 *Moore's Federal Practice*, § 12.30[4] (3d ed., 1998 Supp.). Rather, the court must look to and weigh the facts as adduced by the plaintiff in support of its assertion of subject matter jurisdiction. *Id.*; *see also KVOS,*

Inc. v. Associated Press, 299 U.S. at 278, and *Scott v. Breeland*, 792 F.2d at 927. Here, aside from four declarations from percipient witnesses and a portion of relator Marsha Baker's deposition attesting to poor care at several facilities, the relators offer no further evidence in opposition to this motion despite their burden to come forward with jurisdictional facts.

B. RELATOR'S REQUEST FOR ADDITIONAL DISCOVERY

Second, as mentioned above, the parties stipulated to a bifurcated litigation and discovery plan. Because under the False Claims Act this court's jurisdiction turns, *inter alia*, upon whether the information alleged by the relator has been "publicly disclosed," and if so whether the relator was nonetheless the "original source," *see* 31 U.S.C. § 3730(e)(4)(A), the parties agreed to sever the litigation to avoid extensive discovery on the merits should jurisdiction be lacking. The parties were thus afforded adequate opportunity to conduct any and all discovery as to the subject matter jurisdiction issue—and only that issue—to be followed by the adjudication of this 12(b)(1) motion.

Despite this, relators argue that, in the event the court finds their reliance on their allegations and minimal evidence insufficient, they should be afforded additional time to conduct discovery going to the jurisdictional facts. However, this request contravenes both the scheduling order,[3] and the Stipulated Discovery Plan, in which the relators agreed that

> "defendants' planned Motion to Dismiss cannot be based upon what was known to the Relators' counsel, as this is

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[3] The scheduling order provides that:

> "[a]ll discovery is left open, save and except that it shall be so conducted as to permit a motion directed to the subject matter jurisdiction (public source) issue to be completed by March 31, 1999."

See Order filed January 19, 1999 at 4:10-13.

> not the relevant inquiry. Rather, the inquiry is what was known to the Relator personally and whether the Complaint is based upon public disclosures within the meaning of 31 U.S.C. § 3730(e)(4)(A). The Motion to Dismiss will thus be properly based *only* upon (1) what the Relators have testified to knowing in their depositions, when examined by the defendants; (2) the scope of any public disclosures which are, by their nature, already public; and (3) the Complaint, which determines what this action is 'based upon.'"

See Stipulation Regarding Discovery Dispute at 14.

Although a plaintiff generally should be afforded additional time to complete discovery to fend off an early jurisdictional attack, *see* Fed. R. Civ. P. 12(b), here the relators agreed that the discovery deadline of March 31, 1999 would be sufficient to conduct all necessary discovery relevant to subject matter jurisdiction. Moreover, in light of relators' acknowledgment that the jurisdictional facts are limited to what the relators knew at the time they filed their complaint, it would appear futile to allow them to conduct discovery of facts which are not already in their possession.

Just as dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), this standard "is equally applicable in motions challenging subject matter jurisdiction when such jurisdiction may be contingent upon factual matters in dispute." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Thus, if the jurisdictional facts already adduced by relators fail to withstand this motion, then dismissal will be appropriate without further discovery. In sum, relators' request for additional discovery going to jurisdiction must be denied.

C. RELATORS' REQUEST FOR LEAVE TO AMEND

Lastly, relators ask that they be given leave to amend their complaint if the court finds their allegations insufficient. As I have stated, the sufficiency of the allegations is irrelevant under the standards for a speaking motion. The issue before the court on this motion is whether relators can adduce evidence to dispute the jurisdictional attack. Accordingly, relators' request for leave to amend will be denied as moot.

IV.

JURISDICTION UNDER THE FALSE CLAIMS ACT

A. "PUBLIC DISCLOSURE"

Defendants' attack on the court's subject matter jurisdiction over relators' claim is premised on the public disclosure provision in the FCA. 31 U.S.C. § 3730(e)(4)(A)-(B).[4] Under that statute, this court lacks jurisdiction over allegations based upon prior public disclosures of the same information, unless the relator can establish that she is the original source of the publication.[5] *See United States ex rel.*

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[4] The Act provides:

> "(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

31 U.S.C. § 3730(e)(4)(A)-(B).

[5] The public disclosure provision is designed to avoid "parasitic" suits in which relators attempt to benefit from information already in the

Hagood v. Sonoma County Water Agency ("Hagood I"), 929 F.2d 1416, 1419-20 (9th Cir. 1991).

Under § 3730(e)(4)(A) a district court lacks jurisdiction when: (1) there has been a "public disclosure" (2) of "allegations or transactions" (3) in a "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media" and (4) the relator's action is "based upon" that public disclosure. *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1409 (9th Cir. 1995). The statute's jurisdictional bar is triggered when it is established that there has been a public disclosure of the information contained in relators' allegations.[6] *Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992).

Here, defendants support their jurisdictional challenge with copies of numerous reports completed by the California Department of Health Services ("DHS") reviewing certain aspects of the management practices and delivery of patient care at defendants' facilities,[7] other public reports involving the hospitals, news accounts, and the deposition testimony of the relators.[8] Defendants contend that even if relators' allegations of fraud and falsification of records are true, the

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possession of the government. John T. Boese, *Civil False Claims and Qui Tam Actions*, at 4-32 (1998 Supplement).

[6] Where there has been no public disclosure, there is no need to inquire whether relators were the original source of the allegations of fraud. *United States ex rel Hagood v. Sonoma County Water Agency ("Hagood I")*, 929 F.2d 1416, 1419-20 (9th Cir. 1991).

[7] The court takes judicial notice of the surveys. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (records and reports of administrative agencies are judicially noticeable).

[8] The deponents include Marsha Baker, an individual who volunteered briefly in one of defendants' facilities, and Carol Herman, president of Foundation Aiding the Elderly ("FATE").

information upon which relators based the complaint was previously publicly disclosed by the contents of the state surveys and other reports.[9] Defendants argue that relators cannot dispute that there was no public disclosure prior to the filing of this complaint, because they cannot show that their allegations of falsification are "based upon" anything other than the previous public disclosures, and they cannot refute that they were not the "original source" of the public disclosures.

i. *Administrative Reports*

Relators argue that the state surveys proffered by defendants cannot be deemed public disclosures, because they have not been "actually disclosed," and because state documents are not encompassed by the False Claims Act.

a. *Actual Disclosure*

Courts hold varying views about whether it is necessary for the information to actually have been publicly disclosed, or whether being "potentially accessible" to the public suffices under the Act.[10] The Ninth Circuit has not squarely decided

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[9] Defendants do not concede that they committed fraud. Rather, they argue that, to the extent the relators' allegations of fraud are based upon speculation or inferences drawn from certain facts, those facts are no different from the information already publicly disclosed.

[10] *See, e.g., United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3rd Cir. 1991) (information revealed in discovery in a state civil proceeding without any protective order was a matter of public record, and thus "publicly disclosed" regardless of whether anyone other than the parties to the litigation had actually viewed it); *cf. United States ex rel. Stinson, Lyons Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield, Inc.*, 755 F. Supp. 1040 (S.D. Ga. 1990) (since information received through traditional discovery requests has not been "disclosed" via a civil hearing, a qui tam suit based on such information would not be barred).

this issue.[11] In *United States ex rel. Schumer v. Hughes Aircraft*, the Ninth Circuit held that information that was only potentially available to the public pursuant to the Freedom of Information Act was not publicly disclosed for purposes of the FCA where the documents had never been actually requested nor viewed. *See United States ex rel. Schumer v. Hughes Aircraft*, 63 F.3d 1512 (9th Cir. 1995), *rev'd on other grounds*, *Hughes Aircraft v. United States ex rel. Schumer*, 520 U.S. 939 (1997).

Although the judgment in *Schumer* was vacated for other reasons, the public disclosure discussion, even if binding, is distinguishable. There, the relevant state regulation simply provided that the information "not specifically exempt from disclosure under the Freedom of Information Act shall, upon request, be made accessible to the public." 32 C.F.R. § 286.7(b). The *Schumer* court distinguished between "actual" and "theoretical" availability, and was thus of the

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[11] In *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995), the appellate court considered whether the relator, who had prepared a semiannual Inspector General's report as part of his job, was an original source. *Id.* at 743. In doing so it assumed with the parties—but did not decide—that a provision of the Inspector General Act of 1978 requiring the Inspectors General to prepare semiannual reports summarizing the activities of their offices and to furnish those reports to agency heads, Congress, and the public constituted a public disclosure.

Other discussions of the public disclosure provision by the Ninth Circuit are not dispositive because they address the very different problem presented by news media reports of fraud on the government which precede the filing of the qui tam complaint. *See, e.g., United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University*, 161 F.3d 533 (9th Cir. 1998) (where relator personally discloses allegations to the media prior to filing suit, public disclosure bars FCA claim); and *United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir. 1996) (relator informed news reporter of fraud allegations before filing complaint, and thus inquiry turned on the original source provision).

view that the information in that case was not "publicly disclosed" if it had not in fact been divulged under FOIA. *Id.* at 1519.

Here, in contrast, the statutes mandate disclosure. The surveys are made available to the public by operation of law. *See* 42 U.S.C. § 1395i-3(g)(5)(A)[12] and Cal. Health & Safety Code §§ 1280(e)[13] & 1439.[14] Thus, the federal Department of

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[12] The federal statute provides in relevant part:

> "Each State, and the Secretary, shall make available to the public—
>
> (i) information respecting all surveys and certifications made respecting skilled nursing facilities, including statements of deficiencies, within 14 calendar days after such information is made available to those facilities, and approved plans of correction, . . ."

42 U.S.C. § 1395i-3(g)(5)(A). It further provides that "[e]ach State shall provide its State medicaid fraud and abuse control unit (established under section 1396b(q) of this title) with access to all information of the State agency responsible for surveys and certifications under this subsection." 42 U.S.C. § 1395i-3(g)(5)(D). *See also* 42 C.F.R. § 488.325(a).

[13] The state statute relating to standards of care at health facilities provides:

> "All inspection reports and lists of deficiencies shall be open to public inspection when the state department has received verification that the health facility has received the report from the state department. All plans of correction shall be open to public inspection upon receipt by the state department."

Cal. Health & Safety Code § 1280(e).

[14] The state statute relating to long-term health care facilities states in relevant part:

> "Any writing received, owned, used, or retained by the state department in connection with the provisions of this chapter is a public record within the meaning of subdivision (d) of Section 6252 of the Government Code, and, as such, is open to public inspection pursuant to the provision of Sections 6253, 6256, 6257, and 6258 of the Government Code. However, the names of any persons contained in such records, except the names of duly authorized officers, employees, or agents of the state department conducting an

Health and Human Services (DHHS) has an affirmative obligation to publish the results of the mandatory state audits independent of any particularized requests. Moreover, the surveys must be publicly posted at the skilled nursing facilities. 42 C.F.R. 483.10(g)(1); and Cal. Health & Safety Code. § 1429(a) & (b). Here, the relators do not adduce any evidence disputing defendants' testimony that these surveys were actually posted as required. Glydon Decl. ¶¶ 4 & 5. Therefore, it is undisputed that the state surveys were actually disclosed.

b. *Federal Nature of the Administrative Reports*

Relators also contend that the state audits should not be deemed public disclosures under the Act because they are not "federal" in nature, and do not qualify as "allegations or transactions in a criminal, civil or administrative hearing, [or] in a congressional, administrative, or Government Accounting Office report." *See* 31 U.S.C. § 3730(e)(4)(A). I cannot agree.

A plain reading of the jurisdictional statute does not restrict the source of the publicly disclosed information to federal venues.[15] Rather, the statute read as a whole encompasses the

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investigation or inspection in response to a complaint filed pursuant to this chapter, shall not be open to public inspection and copies of such records provided for public inspection shall have such names deleted."

Cal. Health & Safety Code § 1439.

[15] Some courts have concluded that the "public disclosures" are limited to those allegations or transactions which have been disclosed in the venues strictly enumerated in the statute, *see, e.g., United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 913 F.2d 17, 20 (1st Cir. 1990), and some have limited it to federal proceedings or investigations. *See United States ex rel. Givler v. Smith*, 760 F. Supp. 72 (E.D. Pa. 1991) (does not apply to information disclosed to city housing authority boards), and *United States ex rel. Garibaldi v. Orleans Parish School Board*, 21 F.Supp.2d 607, 614 (E.D. La. 1998) (local school board meeting not a "hearing" within the meaning of the Act). However, in the absence of binding judicial

publication of information originating from a variety of governmental and news media sources. Because federal law mandates that state agencies conduct regular audits of facilities receiving Medicare and Medicaid funding, *see* 42 U.S.C. § 1395i-3(g)(2)(A)(i) & 42 C.F.R. § 488.308(a), and that the audit be made public, the resultant administrative report would appear to be encompassed by the plain terms of the statute.[16]

ii. *The Allegations*

Having concluded that the state agency reports, General Accounting Office ("GAO") reports and news items proffered by defendants suffice as the kind of material enumerated by § 3730(e)(4)(A), defendants then argue that (1) these previously disclosed materials contain the same allegations of substandard care asserted by the relators in their complaint, and (2) the allegations of falsification asserted by the relators must be "based upon" the reports because the relators concede that they had no personal knowledge of falsification of records by any other means or from any other source. Put another way, defendants argue that because relators add nothing but speculation to the publicly disclosed materials, relators' allegations were "based upon" a public disclosure and thus barred by the jurisdictional statute.

The gravamen of relators' qui tam claim is that the management and staff at defendants' skilled nursing facilities

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interpretation of the terms of the statute, I must turn to the language of the statute itself. *See Tello v. McMahon*, 677 F. Supp. 1436, 1441 (E.D. Cal. 1988) (if neither the Supreme Court nor the Ninth Circuit has interpreted the statute, the court employs the traditional methods of statutory construction itself).

[16] Relators do not challenge whether the other evidence proffered by defendants--such as the General Accounting Office (GAO) reports and accounts in the news media—is of the type covered under the FCA public disclosure provision.

engaged in widespread and intentional falsification of patient records in order to conceal substandard service delivery, and thereby profit by receiving federal monies without having provided the requisite services. In support of their assertion that these allegations have been publicly disclosed, defendants point to the myriad administrative audit, GAO reports, and news media publications reporting multiple observations of substandard care at each of defendants' facilities.

Initially, I note that sporadic documentation of substandard care, without more, does not constitute a public disclosure of the alleged falsification of records. It has been explained that "qui tam actions are barred only when enough information exists in the public domain to expose the fraudulent transaction . . . or the allegation of fraud . . . ." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994).[17] While the purported disclosure need not contain an explicit allegation of fraud, *Hagood v. Sonoma Water County Agency ("Hagood II")*, 81 F.3d 1465, 1473 (9th Cir. 1996), the disclosure must contain the elements of the fraudulent transaction. *See, e.g., United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 740 (3rd Cir. 1997). The issue is whether the publicly disclosed information "fairly characterizes" the kind of fraud or corporate policy alleged by the relators. *See Wang*, 975 F.2d at 1417.

Turning to the evidence adduced in the case at bar, the state audits, and the GAO and news reports cite occasional

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[17] The District of Columbia Circuit has been oft-cited for observing that:

> "[I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed."

United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994).

instances of substandard or questionable care, along with several observations of inconsistent or suspect record-keeping in a patient's chart.[18] However, with one exception,[19] the GAO and news media reports do not name the facilities which are defendants in this lawsuit. Similarly, three governmental reports[20] all identified the prevalent falsification of patient records in skilled nursing facilities, but again do not specifically point to any of the hospitals named here. Thus, although these documents publicly disclose substandard care and generalized concern over accurate record-keeping, these documents standing alone do not raise a reasonable inference of a corporate pattern and practice of fraudulent billing for patient services not rendered.

B. "BASED UPON"

Defendants, however, carry the evidentiary challenge one step further arguing that the relators' allegations must have been "based upon" the state surveys, government hearings, and media reports because they have conceded that they have no independent knowledge of their allegations of fraud and falsification of patient records and Medicaid and Medicare billings. Defendants argue that because relators have pointed to nothing outside of the publicly disclosed state audits and

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[18] I concede that I have not read each of the 4000-plus pages of documents in the evidentiary record. Rather, because relators do not contest their contents, I have relied primarily upon the references provided by defendants in their summaries of the relevant evidence.

[19] The one exception includes a September 1995 article in the *Sacramento Bee* which names defendants Foothill Oaks Care Center, Hilltop Manor Convalescent Hospital, Lincoln Manor, and Roseville Convalescent Hospital as delivering substandard care, and which names Foothill Oaks Care Center as falsifying patient records.

[20] These reports include two from October 1982 and August 1983 by the Commission on California State Government Organization and Economy, and a June 1989 report on a Hearing before the Congressional Subcommittee on Aging.

media reports in support of their information or belief that defendants were engaged in fraud, the public disclosure provision bars jurisdiction.

In discovery, the relators stipulated that the Disclosure Statement which they submitted to the government at the time they filed their sealed complaint contained "substantially all material evidence and information the [relator] possesses" regarding the false claims allegations. *See* Stipulation Regarding Discovery Dispute, filed March 9, 1999 at 5:11-12. While the 154-page Disclosure Statement provides greatly detailed allegations of substandard medical care at defendants' facilities, the Statement reports no specific knowledge or information about falsification of records or fraud on the government. Even in a subsection of the Statement entitled "Examples of Company-Wide Falsifications and Non-Compliance," relators only generally plead that "[d]efendants have maintained, and continue to maintain, a company-wide custom and practice of falsifying the activities of daily living ('ADLs') for the various residents to conceal the lack of care and services required." Disclosure Statement at 147:22-25.

At deposition, both relators Baker and Herman conceded that they had no direct knowledge that any staff at any of the named facilities falsified patient records. At oral argument, the relators conceded that at the time they filed their sealed complaint and Disclosure Statement with the government, they possessed no independent knowledge of any falsification of records or fraudulent practices by the defendants. Rather, relators confirmed that their assertion of record falsification or company-wide fraud was based upon an inference drawn from the state audits and their own direct observations of substandard care.[21]

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[21] Although the relators argue that they conducted an independent investigation by personally going into the defendants' facilities and viewing the care and treatment delivered to patients, there is no evidence establishing that relators observed any falsification of patient records prior

In sum, relators have failed to adduce any substantive information regarding the false presentment of claims and have not offered any material information in this action which is not cumulative of that already publicly disclosed.

It is established that on a motion to dismiss, although an explicit allegation of fraud may not be publicly disclosed, without "substantive information about the particular fraud" the relators cannot survive. *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996); and *United States ex rel. Findley v. FPC-Boron Employees Club*, 105 F.3d 675, 688 (D.C. Cir. 1997). A relator may not simply speculate about the existence of a fraudulent transaction based upon publicly disclosed material. *See Findley*, 105 F.3d at 688. This jurisdictional limitation of FCA claims exists to discourage "opportunistic plaintiffs who have no significant information to contribute on their own." *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 362 (9th Cir. 1996). Here, relators have not added any substantive information to that already in the public domain. *See Findley*, 105 F.3d at 688. Because relators have not come forward with any independent evidence to dispute that their allegations must have been "based upon" publicly available documents, the public disclosure provision bars their claims of fraud.

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to filing this complaint. Defendants adduce the transcripts of the depositions in which the defendants asked each relator if they had any knowledge of any of the defendants' facilities. With one exception, the relators had no such knowledge. As for the lone exception, relator Baker volunteered at Sierra Solano Health Care Center prior to the filing of this complaint, and alleged in the Disclosure Statement that she witnessed falsification of patient records while working there. However, at deposition she recanted this allegation, admitting that she had only seen a certified nursing assistant (CNA) delivering services without a patient chart, and did not know if the CNA actually falsified a medical record. *See* Baker Depo. at 138:11-139:9.

C. "ORIGINAL SOURCE"

Relators argue that if the public disclosure bar is triggered, then their claims should nonetheless survive because they were the "original source" of the information. I cannot agree.

Even if they could establish, as they allege, that they were responsible for reporting substandard care at some of the facilities to the state DHS, they have not overcome their burden to establish that their knowledge of the fraud or falsification is "direct and independent." *See* 31 U.S.C. § 3730(e)(4)(B); *and see Wang*, 975 F.2d at 1418. Second-hand information or knowledge not obtained through the relators['] own labor is insufficient to establish the original source exception to the public disclosure bar. *Devlin*, 84 F.3d at 361. Because, as discussed above, relators concede having no direct or independent knowledge of fraud or falsification at defendants' facilities, their claims under the False Claims Act cannot prevail.

V.

ORDER TO SHOW CAUSE

Defendants previously sought a continuance of the hearing on this motion after receiving the relators' opposition, contending that the relators relied upon declarations of witnesses who were not disclosed in discovery. The continuance was granted to allow defendants to conduct further depositions of these new witnesses, but the court ordered defendants to show cause why they had not propounded sufficient discovery requests on relators to uncover these witnesses before bringing the motion.

In response to the order to show cause, defendants recite a portion of the parties' stipulated discovery plan, in which the relators agreed that:

> "The Motion to Dismiss will thus be properly based *only* upon (1) what the Relators have testified to knowing in their depositions, when examined by the defendant; (2)

> the scope of any public disclosures which are, by their nature, already public; and (3) the Complaint, which determines what this action is 'based upon.'"

Stipulation Regarding Discovery Dispute at 14 (emphasis in original). Because of this agreement, defendants assert that they reasonably relied upon the deposition testimony of the relators. The stipulation, they argue, mooted any consideration of what relators' counsel may have know[n], as opposed to what the relators knew, and thus obviated the need for interrogatories inquiring about other witnesses or evidence outside the knowledge of the relators. In light of the agreement reached between the parties, defendants have established good cause why they did not propound discovery requests outside of those contemplated by the stipulation. The order to show cause shall be discharged.

VI.

CONCLUSION

It is well-established that federal subject matter jurisdiction must exist at the time the complaint is filed. *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). Here, relators have adduced no reliable evidence to support their allegations that they had independent knowledge that defendants were engaged in falsification of records or other fraud on the government at the time they filed their complaint.

For the foregoing reasons the court hereby ORDERS that:

1. Defendants' motions to dismiss for lack of subject matter jurisdiction are GRANTED;

2. The court's order to show cause is DISCHARGED; and

3. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: August 19, 1999.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge Emeritus
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
JUDGMENT IN A CIVIL CASE

CASE NUMBER: CIV S-97-548 LKK PAN

FOUNDATION AIDING THE ELDERLY *et al.*

v.

HORIZON WEST *et al.*

[Stamped "Filed Aug 20, 1999
Clerk, U.S. District Court
Eastern District of California"]

XX—Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF August 20, 1999.

Jack L. Wagner,
Clerk of the Court

ENTERED: August 20, 1999

by: [initials]
K. Heiser, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. FOUNDATION AIDING THE ELDERLY, a California Non-Profit corporation; and MARSHA J. BAKER,

Plaintiffs,

v.

HORIZON WEST, INC., a California corporation; AUBURN MANOR, INC., a California corporation, *et al.*,

Defendants.

ORDER

[Stamped "Filed Jan 6, 2000
Clerk, U.S. District Court
Eastern District of California
By Deputy Clerk"]

This matter is before the court on relators' motion for reconsideration. I decide the motion on the pleadings and papers filed herein, and after oral argument.

I.
PROCEDURAL HISTORY

Relators, Foundation Aiding the Elderly ("FATE")[1] and Marsha Baker, bring this qui tam suit under the False Claims Act alleging that defendants Horizon West, Inc. and the corporate owners of thirty-nine other skilled nursing facilities engaged in a pattern and practice of falsifying medical records to conceal inadequate medical care.

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[1] FATE is a California non-profit corporation.

Pursuant to the parties' stipulation, the court's scheduling order provided that subject matter jurisdiction would be considered first, and therefore directed that during the initial phase the parties were to conduct all discovery necessary to fully resolve the jurisdictional issue. Defendants filed a motion challenging the court's subject matter jurisdiction over relators' claims.[2] For the reasons stated in its order, the court granted defendants' motion and dismissed the case.

Relators moved for reconsideration. The court heard oral argument on relators' motion on November 1, 1999. One month later, before the court issued a decision, relators filed a notice of appeal to the Ninth Circuit. Mistakenly believing it had lost jurisdiction, the court denied relators' motion for lack of jurisdiction. *See* Order filed December 8, 1999. Thereafter, the parties contacted the court and conveyed their understanding that, pursuant to Fed. R. App. P. 4, a district court retains jurisdiction to decide a motion for reconsideration even where the moving party files an appeal before the court has issued its ruling. Having reviewed Rule 4 and *Tripati v. Henman*, 845 F.2d 205, 206 (9th Cir. 1988), I agree. Accordingly, I now decide relators' motion for reconsideration.

II.

STANDARDS

"Under the 'law of the case' doctrine a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (citing *Thomas v. Bible*, 983 F.2d 153, 154 (9th

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[2] In actuality, defendants noticed forty separate motions for dismissal—one brought by each individual defendant—in addition to a joint motion addressing all similar legal and factual issues. The relators opposed all forty-one motions with one joint motion.

Cir.), *cert. denied*, 508 U.S. 951 (1993)). Although motions to reconsider are directed to the sound discretion of the court, *see Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds*, 824 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988), considerations of judicial economy weigh heavily in the process. Thus, Local Rule 78-230(k) requires that a party seeking reconsideration of a district court's order must brief the "new or different facts or circumstances [which] were not shown upon such prior motion, or what other grounds exist for the motion." Generally speaking, before reconsideration may be granted there must be a change in the controlling law, facts or other circumstances, the need to correct a clear error, or the need to prevent manifest injustice. *Alexander*, 106 F.3d at 876.

As with motions to alter or amend a judgment made pursuant to Fed. R. Civ. P. 59(a), motions to reconsider are not vehicles permitting the unsuccessful party to "rehash" arguments previously presented, *see Costello v. United States Government*, 765 F. Supp. 1003, 1009 (C.D. Cal. 1991). Nor is a motion to reconsider justified on the basis of new evidence which could have been discovered prior to the court's ruling. *Fay Corp. v. BAT Holdings One, Inc.*, 651 F. Supp. 307, 309 (W.D. Wash. 1987), *aff'd*, 896 F.2d 1227 (9th Cir. 1990). Finally, "after thoughts" or "shifting of ground" do not constitute an appropriate basis for reconsideration. *Id.* These relatively restrictive standards "reflect[] district courts' concern for preserving dwindling resources and promoting judicial efficiency." *Costello*, 765 F. Supp. at 1009.

III.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Defendants based their motion to dismiss on the public disclosure provision of the False Claims Act. 31 U.S.C.

§ 3730(e)(4)(A)-(B).[3] Under that provision, the court lacks jurisdiction over allegations based upon prior public disclosures of the same information, unless relators can establish that they are the original source of the publication.[4] *See United States ex rel. Hagood v. Sonoma County Water Agency ("Hagood I")*, 929 F.2d 1416, 1419-20 (9th Cir. 1991).

Defendants argued that the allegations of relators' complaint were previously disclosed by state agency reports, General Accounting Office reports and news media publications. Further, defendants argued that relators' allegations were based upon publicly disclosed information because they offered no material information which was not cumulative of that already disclosed by the above documents. Finally, defendants argued that relators' knowledge of the alleged fraud was not "direct and independent" of the publicly disclosed information and therefore that relators were not the original source of their allegations.

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[3] The Act provides:

> "(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

31 U.S.C. § 3730(e)(4)(A)-(B).

[4] The public disclosure provision is said to be designed to avoid "parasitic" suits in which relators attempt to benefit from information already in the possession of the government. John T. Boese, *Civil False Claims and Qui Tam Actions*, at 4-32 (1998 Supplement).

The court disagreed with defendants' first argument: "[A]lthough these documents publicly disclose substandard care and generalized concern over accurate record-keeping, these documents standing alone do not raise a reasonable inference of a corporate pattern and practice of fraudulent billing for patient services not rendered." Order filed August 20, 1999. The court agreed, however, that relators' complaint failed to add any substantive information to that already in the public domain, *id.* at 20 (citing *United States ex rel. Findley v. FPC-Boron Employees Club*, 105 F.3d 675, 688 (D.C. Cir. 1997)), and that relators failed to demonstrate any direct and independent knowledge of the alleged fraud, *id.* at 21 (citing *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992)). Accordingly, the court granted defendants' motion to dismiss pursuant to the public disclosure bar.

IV.

GROUNDS FOR RECONSIDERATION

Relators move for reconsideration on two grounds: (1) given that relators' allegations were not previously disclosed by public documents, the court wrongly subjected their allegations to the "based upon" and "direct and independent knowledge" inquiries; and (2) even if the court properly subjected relators' allegations to the "based upon" inquiry, the court wrongly concluded that relators failed that test. Thus, relators assert reconsideration is proper because the court committed clear error. *Alexander*, 106 F.3d at 876. I address each ground for reconsideration seriatim.

First, upon reconsideration, the court realizes its error in holding that the allegations of relators' complaint were not publicly disclosed. Relators' complaint does no more than draw an inference of fraud from information previously disclosed in public documents. A relator adds no "substantive information," *United States ex rel. Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996), to that

already in the public domain when she merely assembles that information and draws inferences therefrom. "[W]here the public knows of information proving an allegation, it necessary knows of the allegation itself." *Wang*, 975 F.3d at 1418. Therefore, "fraud need not be explicitly alleged to constitute public disclosure." *United States ex rel. Harshman v. Alcan Electrical and Engineering, Inc.*, 1999 WL 795970 at *5 (9th Cir. Oct. 7, 1999). Accordingly, relators' allegations were previously disclosed by public documents, and the court properly engaged in the "based upon" and "direct and independent knowledge" inquiries.

Second, relators assert their allegations are not based upon publicly disclosed information because they did not review or rely upon public records in reaching their conclusion that defendants were committing fraud. I cannot agree. "[A] qui tam complaint filed after allegations have been publicly disclosed is, by definition, 'based upon' the publicly disclosed information." *Id.* As noted above, the allegations of relators' complaint were publicly disclosed before they filed their complaint. Therefore, relators' complaint is based upon publicly disclosed information.

V.

ORDERS

For all the foregoing reasons, the court hereby makes the following ORDERS:

1. Relators' motion for reconsideration is GRANTED; and

2. The court's order granting defendants' motion to dismiss is CONFIRMED.

IT IS SO ORDERED.

Dated: January 4, 2000

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge Emeritus
United States District Court

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. FOUNDATION AIDING THE ELDERLY; MARSHA J. BAKER,
Plaintiffs-Appellants,

v.

HORIZON WEST INC., a California corporation; HERITAGE CONVALESCENT HOSPITAL; EMPRESS CONVALESCENT HOSPITAL; EMERALD DISTRIBUTING COMPANY, INC.; FAR WEST INC., a California corporation; LINWOOD GARDENS CONVALESCENT HOSPITAL, INC., a California corporation; MID-VALE CONVALESCENT HOSPITAL, INC.; SACRAMENTO CONVALESCENT HOSPITAL, INC., a California corporation; SOUTH GATE CARE CENTER INC., a California corporation; VALLEJO CONVALESCENT HOSPITAL, INC., WESTGATE GARDENS CONVALESCENT CENTER, INC.; MONTEREY BAY CONVALESCENT HOSPITAL, INC.; SIERRA MEDICAL ENTERPRISES INC. SIERRA MEDICAL ENTERPRISES, INC. dba Grass Valley Convalescent Hospital; EL DORADO CONVALESCENT HOSPITAL INC.; FOOTHILL OAKS CARE CENTER INC.; HILLTOP MANOR CONVALESCENT HOSPITAL INC.; LAKEPORT SKILLED NURSING CENTER INC.; LINCOLN MANOR INC.; LIVE OAK MANOR INC.; MEADOW VIEW MANOR INC.; MONTEREY PINES SKILLED NURSING FACILITY INC.; NAPA NURSING CENTER INC.; PLACERVILLE PIES [*sic*] CONVALESCENT HOSPITAL INC.; ROSEVILLE CONVALESCENT HOSPITAL INC.; SIERRA HILLS CARE CENTER INC.; SUNNY HILLS CONVALESCENT HOSPITAL

INC.; VALLEY VIEW SKILLED NURSING FACILITY INC.; WALNUT WHITNEY CONVALESCENT HOSPITAL INC.; SIERRA SOLANO CARE CENTER INC.; WESTCARE MANAGEMENT INC.; FOUR CORNERS REGIONAL CARE CENTER INC.; PARKDALE CARE CENTER INC.; RED CLIFFS REGIONAL INC.; HORIZON WEST INC.; PACIFIC WEST PHARMACY INC., California corporations; ELLEN L. KUYKENDALL; BERNICE SCHRABECK; MICHAEL MCDONALD; MILTON HARMON; AUBURN MANOR INC., dba Golden Empire Convalescent Hospital dba Parkview Nursing Center; MEDICREST OF CALIFORNIA INC., dba Medical Center Convalescent Hospital; MEDICREST OF CALIFORNIA INC., dba Arlington Gardens Convalescent Hospital dba Montclair Manor Convalescent Hospital; WHITEHALL CONVALESCENT HOSPITAL INC., dba Wellesley Manor Convalescent Hospital; SIERRA HEALTH CARE MANAGEMENT CORPORATION dba Sierra Health Care Convalescent Hospital; SANDY REGIONAL INC., Sandy Regional Convalescent and Rehabilitaion [*sic*] Center

Defendants-Appellees.

No. 99-17539
DC No. CV-S-97-548-LKK

[Stamped "Filed Dec 21 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals"]

ORDER

Before: REINHARDT, TASHIMA, and BERZON, Circuit Judges.

The opinion filed on September 13, 2001, and reported at 265 F.3d 1011, is amended, as follows:

Slip op. at 13218, 265 F.3d at 1014, the statutory citation at the end of footnote 2 is corrected to read: "31 U.S.C. § 3730(e)(4)(A)."

Slip op. at 13222, 265 F.3d at 1016, in the last paragraph of Part II.C, third sentence, substitute "To put it somewhat differently," for "To put is somewhat differently,".

Slip op. at 13223, 265 F.3d at 1016, in Part II. D, fourth sentence, substitute "We do not dispute Appellees' assertion" for "We do not dispute Appellants' assertion".

The panel has voted to deny the petition for panel rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 99-17539
CT/AG#: CV-97-00548-LKK

UNITED STATES OF AMERICA ex rel. FOUNDATION AIDING THE ELDERLY; MARSHA J. BAKER,
Plaintiffs-Appellants,

v.

HORIZON WEST INC., a California corporation; HERITAGE CONVALESCENT HOSPITAL; EMPRESS CONVALESCENT HOSPITAL; EMERALD DISTRIBUTING COMPANY, INC.; FAR WEST INC., a California corporation; LINWOOD GARDENS CONVALESCENT HOSPITAL, INC., a California corporation; MID-VALE CONVALESCENT HOSPITAL, INC.; SACRAMENTO CONVALESCENT HOSPITAL, INC., a California corporation; SOUTH GATE CARE CENTER INC., a California corporation; VALLEJO CONVALESCENT HOSPITAL, INC., WESTGATE GARDENS CONVALESCENT CENTER, INC.; MONTEREY BAY CONVALESCENT HOSPITAL, INC.; SIERRA MEDICAL ENTERPRISES INC. SIERRA MEDICAL ENTERPRISES, INC. dba Grass Valley Convalescent Hospital; EL DORADO CONVALESCENT HOSPITAL INC.; FOOTHILL OAKS CARE CENTER INC.; HILLTOP MANOR CONVALESCENT HOSPITAL INC.; LAKEPORT SKILLED NURSING CENTER INC.; LINCOLN MANOR INC.; LIVE OAK MANOR INC.; MEADOW VIEW MANOR INC.; MONTEREY PINES SKILLED NURSING FACILITY INC.; NAPA NURSING CENTER INC.; PLACERVILLE PIES [*sic*] CONVALESCENT HOSPITAL INC.; ROSEVILLE CONVALESCENT HOSPITAL INC.; SIERRA HILLS CARE

CENTER INC.; SUNNY HILLS CONVALESCENT HOSPITAL INC.; VALLEY VIEW SKILLED NURSING FACILITY INC.; WALNUT WHITNEY CONVALESCENT HOSPITAL INC.; SIERRA SOLANO CARE CENTER INC.; WESTCARE MANAGEMENT INC.; FOUR CORNERS REGIONAL CARE CENTER INC.; PARKDALE CARE CENTER INC.; RED CLIFFS REGIONAL INC.; HORIZON WEST INC.; PACIFIC WEST PHARMACY INC., California corporations; ELLEN L. KUYKENDALL; BERNICE SCHRABECK; MICHAEL MCDONALD; MILTON HARMON; AUBURN MANOR INC., dba Golden Empire Convalescent Hospital dba Parkview Nursing Center; MEDICREST OF CALIFORNIA INC., dba Medical Center Convalescent Hospital; MEDICREST OF CALIFORNIA 1 INC., dba Arlington Gardens Convalescent Hospital dba Montclair Manor Convalescent Hospital; WHITEHALL CONVALESCENT HOSPITAL INC., dba Wellesley Manor Convalescent Hospital; SIERRA HEALTH CARE MANAGEMENT CORPORATION dba Sierra Health Care Convalescent Hospital; SANDY REGIONAL INC., Sandy Regional Convalescent and Rehabilitaion [*sic*] Center

Defendants-Appellees.

[Stamped "Filed Jan 16 2002" by the "Clerk, U.S. District Court, Eastern District of California, By [Initials] Deputy Clerk"]

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said

District Court in this cause be, and hereby is reversed and remanded.

Filed and entered: September 13, 2001

[Stamped "A True Copy Attest Jan 14 2002 Cathy Catterson Clerk of Court by [initials] Deputy Clerk. This certification does constitute the mandate of the court."]